INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Discussion	7
Appendix A	8
Appendix B	24

CITATIONS

Cases:

National Labor Relations Board v. *The Babcock and Wilcox Company*, 222 F. 2d 316, certiorari granted, No. 250, Oct. Term, 1955 ..... 5, 7

National Labor Relations Board v. *Seamprufe, Inc.*, 222 F. 2d 858, certiorari granted, No. 251, Oct. Term, 1955 ..... 5, 7

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 7 24

Section 8(a)(1) 24

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONSANTO CHEMICAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 22, 1955, denying enforcement of an order issued by the Board against Monsanto Chemical Company, hereinafter called the Company.

OPINION BELOW

The opinion of the court below (App. A, *infra*, pp. 8-22) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 26, 34-38) are reported at 108 NLRB 1110.

JURISDICTION

The judgment of the court below was entered on August 22, 1955 (App. A, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer violates Section 8(a)(1) of the National Labor Relations Act, as amended, by prohibiting nonemployee union organizers from distributing union literature on his plant parking lot during the employees' free time, where it is unreasonably difficult for the union to reach the employees off company property in the immediate vicinity of the plant.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*), are set forth in Appendix B, *infra*, p. 24.

STATEMENT

A. *The facts.*—Upon the usual proceedings under Section 10 of the Act, the Board, on May 27, 1954, issued its findings of fact, conclusions of law, and order (R. 7-26, 35-38). The facts, as found by the Board and adopted by the court below, may be summarized as follows:

The Company's plant is located on a 500-acre tract of land about one mile from the limits of the town of Soda Springs, Idaho, a community of

about 2,000 inhabitants (R. 8-9; 155-156, 187). Approximately two-thirds of its 130 employees live in Soda Springs, the remainder at distances up to 39 miles from the plant (R. 25; 125, 156, 189-190). All the employees drive to the plant in private automobiles (R. 25; 133). When they reach the plant property they drive from the public highway along a driveway owned by the Company for approximately one-half mile, and park in an area provided by the Company adjacent to, but outside the fence which surrounds the plant buildings (R. 9-10; 63-64).

In August 1953, the Company promulgated a rule which prohibited the circulation of petitions or the posting or distribution of any literature on company property without the approval of the plant manager (R. 10; 137-139, 189).

On September 28, 1953, an organizer for the International Association of Machinists, Local Lodge No. 1933, AFL, hereinafter called the Union, accompanied by the union's business representative, went to the parking area and requested permission to distribute union literature from the plant guard (R. 15; 83-84, 112). The guard refused the request stating that the distribution of literature was forbidden by company rule (R. 15; 83-84). They then interviewed management representatives who also refused the request for permission on the grounds that the distribution of any literature on company property was contrary to company policy and that the granting of permission to one union to distribute literature would encourage other unions to

seek the same privilege (R. 15; 84-88). The union representatives thereupon proceeded to the intersection of the company driveway and the public highway, stationed themselves near a "stop" sign on the company driveway near the intersection and attempted to distribute literature to employees as they left the plant property. They found, however, that, as upon former occasions when attempts had been made to distribute literature at this point, the employees did not heed the stop sign and did not slow down to accept the proffered literature (R. 16; 90-91, 113-114).

On October 1, 1953, the union representatives drove to the parking area and began to distribute literature to employees as they came on the lot to get into their cars at the end of the shift (R. 16; 92-93, 114-115). The guard promptly ordered them to leave the area (R. 16; 93, 115-116). They returned to the highway intersection but again found the effective distribution of literature to be impossible because none of the cars entering and only a few of those leaving the property stopped near them (R. 16-17; 94-95, 116-119).

B. *The Board's conclusions and order.*—Upon the foregoing facts, and the entire record, the Board (one member dissenting), adopted the findings of the trial examiner, and held that the Company, by forbidding the union organizers from distributing union literature on the plant parking lot, had violated Section 8(a)(1) of the Act (R. 17-27). The Board found that "the distribution of union literature to employees off [the Company's] prop-

erty [near the plant] is virtually impossible, at times hazardous, and that it cannot readily be conducted"; that there was no showing that the employees were readily accessible either in the nearby town or at their homes; that, in these circumstances, the Company's rule against the distribution of such literature constitutes "an unreasonable impediment to the freedom of communication in the exercise of its employees' right to self-organization"; and that, no showing having been made of special circumstances justifying the rule, the employer's proprietary interest may properly be subordinated to the employees' exercise of their right to self-organization (R. 26). Accordingly, the Board ordered the Company to rescind, and cease and desist from enforcing, its rule prohibiting the distribution of union literature on its parking lot during the employees' nonworking time.

C. *The decision of the court below.*—The court below (*infra*, pp. 8-22), Judge Healy dissenting, set aside the order of the Board on substantially the same grounds that the Fifth and Tenth Circuits set aside similar Board orders in, respectively, *National Labor Relations Board* v. *The Babcock and Wilcox Co.*, 222 F. 2d 316, and *National Labor Relations Board* v. *Seamprufe, Inc.*, 222 F. 2d 858, Nos. 250 and 251, this Term, certiorari granted, October 10, 1955.

After noting that all the employees customarily wore jackets bearing the Company's name when they left the plant and as they went about their personal affairs in the nearby town; that the union

organizer testified that "We have communication with some of the employees practically all the time"; and that there was no showing that a substantial majority of the employees could not be reached through the mails, the court concluded that there was "no showing of virtual impossibility or unreasonable difficulty" in communicating with the employees for purposes of self-organization which would justify invalidating the Company's rule against distribution of literature on its parking lot (*infra, pp.* 19-20). These circumstances, coupled with the further fact that "the union representatives were unable to disclose any authority from any employees to carry on the organization of a union on the employees' behalf," established, in the court's view, that there had been no "denial of rights granted the employees by § 7 of the Act" (*infra,* pp. 20-21).

Judge Healy, dissenting, noted that it was implicit in the majority opinion that the Company could not lawfully have prohibited its employees from distributing union literature in the parking lot, and, accepting the Board's view, said there was no valid basis for drawing a distinction between them and outside organizers, for in either case "the distributors would be pursuing the same end, namely, to advise the workers * * * of their rights under the Act and of the purported advantages of unionization" (*infra,* p. 22).

DISCUSSION

The question presented here is the same as that presented in *National Labor Relations Board* v. *The Babcock and Wilcox Company* and *National Labor Relations Board* v. *Seamprufe, Inc.*, Nos. 250 and 251, respectively, this Term, in which this Court granted certiorari on October 10, 1955. Accordingly, we respectfully suggest that the Court retain this petition on its docket pending decision in Nos. 250 and 251, and that the petition be thereafter disposed of in accordance with the holding in those cases.

Respectfully submitted,

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OCTOBER 1955.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,472

Jul. 27, 1955

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

MONSANTO CHEMICAL COMPANY,
Respondent

Petition for Enforcement of an Order of the National Labor Relations Board

Before STEPHENS, HEALY and POPE, Circuit Judges.

POPE, Circuit Judge.

The General Counsel of the above named Board filed a complaint against respondent charging it with unfair labor practices within the meaning of § 8(a)(1) of the National Labor Relations Act.[1]

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[1] "§ 8(a)(1) It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

"§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

See U.S.C.A. Title 29, §§ 157 and 158.

The complaint arises out of the refusal of the respondent to permit the representatives of a labor union to distribute union literature to company employees on a parking lot which respondent provided for the use of its employees on company property adjacent to the company's chemical plant near Soda Springs, Idaho.

Respondent owns a 500 acre tract of land approximately one mile from Soda Springs, a town of some 2000 inhabitants. Its chemical manufacturing plant is located upon that tract of land and the buildings are approximately half a mile from the state highway which runs past the tract. Its private road leads from the highway to the plant structures. Near the plant office building the respondent has provided a parking area for the use of its employees. It is separated by a fence from the plant buildings. There is no public transportation available and all the employees ride to work in private automobiles. After they leave the automobiles in the parking area they enter a building where they change clothes and punch time cards and then pass through a gate to the plant buildings. The company employs approximately 130 employees and operates seven days a week on a three shift basis.

In August, 1953, the respondent promulgated a rule which was incorporated in a manual circulated to its employees reading as follows: "Soliciting: Soliciting funds and selling tickets or any article on company property without approval of the plant manager is prohibited. Petitions: Circulat-

ing petitions or posting or distributing any literature on company property without approval of the plant manager is prohibited." On September 28, 1953, an organizer for the union here involved, accompanied by a union business representative, went to the parking area and there requested of the guard in charge of the area the privilege of distributing union literature. They were told that the company rule forbade this. They then interviewed management representatives who refused to grant permission to distribute literature in the parking area stating that the distribution of union or other literature on company property was contrary to the company policy. The union representatives then returned to a point where the private road from the company plant approached the state highway and stationed themselves there for the purpose of undertaking to distribute union literature to employes who drove away from the plant toward the highway. Although a stop sign was placed at this location, yet because there was little traffic on the highway, most of the employees' automobiles did not stop there. Hence on this occasion as on previous occasions when distribution had been attempted at this point by the union representatives they found little or no opportunity to distribute their literature for the employees simply drove past without stopping. It is conceded that the respondent had and expressed no objection to the distribution of literature on the private road and at that highway intersection. Later the two union representatives returned to the parking area and

commenced distribution of literature there. They were then approached and ordered to leave the place and they did so. Again they attempted to distribute literature at the highway intersection but again found that their efforts were unsuccessful because the cars moving toward or from the highway would not stop.

The Board approved the following finding of the Examiner: "Respondent contends and I agree that there is no rule barring the solicitation for union membership by employees on company property; nor is there any evidence that such a policy has been followed. And the above-quoted rule, forbidding distribution of literature on company property, has been uniformly enforced. In addition to the attempt of the union representatives to distribute literature, described below, the record discloses that Respondent, on two occasions, immediately stopped the distribution of other literature in this parking area, once by an automobile dealer and once by high school students, soliciting purchases of automobiles and attendance at a school function respectively. No other distributions of any nature have been attempted or permitted."

Respondent's plant began operation about December 1, 1952. At the time here in question its employees had never been represented by any labor organization. 85% of the employees lived within a radius of 12 miles from the plant and over 67% lived at Soda Springs. The Board found that the respondent asserted its right to control the use of its private property in the manner indicated in

good faith, but nevertheless found that by enforcing the rule in question, it had been engaged in conduct violative of § 8(a)(1) of the Act.

Recently two other courts of appeals have had occasion to consider petitions for enforcement where the facts cannot be distinguished from those present here, and in each case enforcement was denied. In N.L.R.B. v. Babcock & Wilcox Co., 5 Cir., — F. 2d —, decided May 10, 1955, the respondent had a rule prohibiting distribution of literature on its premises including its parking lot, walkways and drive. In that case, as here, the persons seeking to make distribution of literature were union representatives "not employed by or otherwise connected with the company and not working in concert with or upon the solicitation of any of its employees." Distinguishing the case of Labor Board v. Le Tourneau Company of Georgia, 324 U. S. 793,[2] on the ground that in that case it was company employees who were seeking and who had been forbidden to distribute literature upon company premises, the court said (p. 5): "We find ourselves in full agreement too with the contention of the respondent that the orders of the board in this case are not in accordance with but in direct violation of the letter and spirit of the Labor Management Act, as amended. Indeed, we are at a loss to understand how on this record, which contains neither findings, nor evidence furnishing a basis for findings, that the rights or interests of respondent's employees are involved or will be fur-

[2] Decided with Republic Aviation Corp v. Board.

thered by compelling the respondent to institute a discriminatory application in favor of a particular labor union of its non-distribution rule, the board can take to itself the power to accord the union rights which the statute does not accord it by imposing against the respondent, in favor of a particular union, a servitude on its property which the law, neither in terms nor in spirit, accords to it, in a case, too, where no employee is involved, no employee is complaining, and no rights of employees have been invaded or abridged by the respondent."

In National Labor Relations Board v. Seamprufe, Inc., 10 Cir., — F. 2d —, decided May 4, 1955, the facts were substantially the same in that the complaint charged the respondent with prohibiting the use of its private parking area and adjacent areas by a non-employee union organizer for distribution of union literature and solicitation of employees to union membership during the employees' non-working hours. There also it appears that the manufacturing plant was located near a small town; it employed approximately 200 persons, two-thirds of whom lived in town and the balance within a radius of five to thirty miles from the city. All employees rode to and from work in privately owned automobiles. There also the nonstop method of driving from and to the plant made it virtually impossible for the union representative to communicate with the employees as they drove on or off the property. The court refused to enforce the board's order requiring the employer to desist from prohibiting the use of its parking lot

by non-employee union organizers and said: "As we have seen, the fundamental basis for permitting the solicitation of union membership on company property is to vouchsafe the guaranteed right of self-organization. N.L.R.B. v. Le Tourneau, supra. When conducted by employees the solicitation amounts to the exercise of a right subject only to the correlative right of the employer to maintain plant production and discipline. An employee on company property exercising the right of self-organization does not violate a company no-trespass rule. But a non-employee labor organizer who comes upon company property in violation of a non-discriminatory no-trespass rule can justify his presence there only insofar as it bears a cogent relationship to the exercise of the employees' guaranteed right of self-organization.

"Here the union which the non-employee solicitors represented was not the bargaining agent for the employees. Indeed the employees did not belong to any union, and the solicitors were therefore strangers to the right of self-organization, absent a showing of nonaccessibility amounting to a handicap to self-organization."

It is to be noted that the Court of Appeals for the Fourth Circuit in N.L.R.B. v. Caldwell Furniture Co., 199 F. 2d 267, apparently enforced an order of the Labor Board where the order had been directed at the application of a rule prohibiting distribution of union literature by nonemployee union representatives. The brief per curiam opin-

ion fails to make note whether the persons prohibited from making the distribution were employees, although the board's report of its decision indicates that they were not.[3] The question here presented does not appear to have been raised in that case, for the court makes no mention of it.

N.L.R.B. v. Monarch Tool Co., 6 cir., 210 F. 2d 183, was also a case in which the court enforced the board's order finding that the enforcement of a company rule prohibiting the distribution of circulars and leaflets on the company's automobile parking areas was an unfair labor practice. Apparently those who participated in the distribution of union literature included employees. The Examiner's report referred to them in one place as "union workers" and in giving an account of the steps taken to secure distribution of literature, the examiner said that after a certain parking lot was opened "principal distribution of union literature and circulars was made by respondent's employees in, or closely adjacent to, the vestibule entrance of the plant. . . ." There is reason to assume that the court treated that as a case involving distribution of literature by employees for it cited as authority for its decision the Le Tourneau case, supra, without any suggestion that the facts pres-

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[3] 97 N.L.R.B. 1501. Two other per curiam opinions of the Fourth Circuit are cited as being in accord with the Caldwell Furniture case.—National Labor Relations Board v. Carolina Mills, 190 F. 2d 675, and National Labor Relations Board v. Glen Raven Silk Mills, 203 F. 2d 946. We find nothing in either opinion which so indicates.

ently before the court were any different than those there involved.[4]

In some cases clearly distinguishable from the one before us it has been held that under §7 of the Act, a union organizer who is not an employee cannot be denied the privilege of entering and soliciting union membership on the employer's premises. In Labor Board v. Stowe Spinning Co., 336 U.S. 226, the prohibition which was pronounced an unfair labor practice stemmed from the fact that the employer was discriminating against the union in not permitting a union meeting in the company-owned hall which was generally available for other types of meetings.

Another type of case was forecast in the Le Tourneau case where (p. 799) it was said: "Neither of these is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped."

The precise case arose in National Labor Rel. Bd. v. Lake Superior Lumber Corp., 6 cir., 167 F. 2d 147. There the employees and employer were engaged in logging operations in the woods, 17 or 18 miles from the nearest city. After their

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[4] In National Labor Relations Board v. Ranco, Inc., 6 cir., — F. 2d —, decided ——, 1955, the same court enforced an order of the board relating to distribution of union literature by "union representatives" on the company's parking lot. If the order related to non-employee representatives, there is nothing in the order to show that the court considered the problem here presented.

workday ended at 4 P.M., the employees spent their time in the camps where bunk houses were provided for them. They generally spent their Sundays there too. The unfair labor charges involved the right of the employer (a) to prohibit one of its own employees from soliciting union membership from employees in a bunk house in the evening after work hours; and (b) to prevent union representatives from entering a bunk house to visit members of the union to solicit other employees. The court enforced the order of the court finding the employer guilty of unfair labor practices in both respects.

Marshall Field & Co. v. National Labor Relations Bd., 7 cir., 200 F. 2d 375, involved questions of the rights both of store employees and of non-employee union representatives to solicit union membership on the premises owned and occupied by a large city department store. The court undertook to review and analyze the Supreme Court's holding in the Le Tourneau case and pointed out that that case dealt only with union organizers who were employees of the company. It noted that the gist of the Supreme Court decision was indicated in its quotation in a footnote from the Board's decision in Peyton Packing Co., 49 N.L.R.B. 828, 843. In referring to the presumed validity of a rule prohibiting union solicitation during working hours, it was indicated that it was competent for the board to treat as an unreasonable restraint a rule prohibiting employees outside working hours to make solicitation on company

property. This appears from the following language quoted by the Supreme Court from the board's decision in that case (p. 382): "It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property."

The court of appeals declined to apply so broad a rule as that to the complaints respecting the non-employee union solicitors in the Marshall Field case. It did, however, uphold the board's ruling that it was an unfair labor practice for the employer to prohibit the union organizers to solicit on the company's private street known as Holden Court. This street the opinion discloses was a private road or alley way separating the two portions of the store's main building on the ground floor. The court said of this (p. 380): "This is primarily a working area used occasionally by employees and customers. However, it does partake of the nature of a city street, even though owned by the company, and we think there is substantial evidence to sustain the findings of the Board with respect to Holden Court."[5] It will be noted that as a pedestrian and customer means of access to the Marshall Field store, Holden Court had some resemblance to the access road upon which the union

[5] The Board said of this area: "This private street, Holden Court, traverses the center of the respondent's store at street level. It is open to the public for pedestrian use." Marshall Field & Co., 98 N.L.R.B. 88, 93.

organizers in this case made their attempts to distribute literature.

We note here that the examiner and the Board which adopted his findings did not undertake to base their conclusions upon any inference or presumption similar to that expressed in the language which we have quoted above from the Board's decision in the Peyton Packing Co. case. The reason for the decision here was expressed as follows: "The Board and courts have recognized that employees and a labor organization do not have an absolute right to the use of company property for the distribution of union literature. But it has likewise been held that where, as here, it is virtually impossible or unreasonably difficult for a labor organization to disseminate literature to employees off the premises of the employer, the Act protects the right to carry on such distribution on company property." In short, the Board appears to have predicated its conclusions upon the assumption that this was a case like the Lake Superior Lumber Corp. case, supra, in that it was "virtually impossible or unreasonably difficult" to reach employees off the premises of the employer.

The record here fails to sustain any such conclusion. Wright, the business agent of the union, one of the two union representatives who sought to distribute the literature on the parking lot, testified that he had made no attempt to contact employees in Soda Springs where 67% of the employees lived.

He testified that he had made no attempt to contact employees by mail. The personnel manager of the respondent company testified that the company had not been asked for the names or addresses of its employees and this testimony was not contradicted.

The record further shows that all employees customarily wore jackets bearing the name "Monsanto" across the backs; that they wore these jackets when they left the plant and as they went about their personal affairs in the City of Soda Springs and elsewhere. These jackets were furnished the employees in suitable weights for both winter and summer use. It is plain therefore that there was no showing of virtual impossibility or unreasonable difficulty in identifying or reaching the employees or enough of them so that the self-organization contemplated by § 7 of the Act could be initiated. In addition, Phelan, the Grand Lodge representative, the other union organizer who sought to make use of the parking lot, testified "We have communication with some of the employees practically all the time."

If this contact existed and yet the union representatives were unable to disclose any authority from any employees to carry on the organization of a union on the employees' behalf, that fact alone is significant. It demonstrates that the record fails to show that the company's refusal to these non-employee union organizers was in some respect

a denial of rights granted the employees by § 7 of the Act.[6]

It is to the employees that rights are granted by § 7. Notwithstanding the section also grants them the right to "refrain from any or all of such activities", it may fairly be said that in a situation such as that presented by the Lake Superior Lumber Corp. case, supra, the employees' rights include the right to have union organizers approach them. But the facts here do not present that kind of case. As stated in the Seamprufe case, supra, "Unlike the employees of a lumber or mining camp who live and work on company property isolated from outside contacts, as in N.L.R.B. v. Lake Superior Lumber Corp., supra, the employees here lived in or near a small city and were easily accessible to union solicitors. There was no impediment to

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[6] Mr. Justice Reed, who wrote the opinion in the Le Tourneau case, should know as well as anyone what that case held. Speaking of it, he said in his dissent in Labor Board v. Stowe Spinning Co., supra: (p. 243) "It has never been held that where the employees do not live on the premises of their employer a union organizer has to be admitted to those premises. The present situation differs from the employer-controlled areas where employees both live and work in that here union organizers may solicit the employees on the streets or in their homes or at public meeting houses within a few miles of their employment. Employees are not isolated beyond the hours of labor from an organizer nor is an organizer denied access to the employees. After an organizer has convinced an employee of the value of union organization, that employee can discuss union relations with his fellow-employees during non-working hours in the mill. This gives opportunity for union membership proliferation. Republic Aviation Corp. v. Labor Board and Labor Board v. Le Tourneau Company of Georgia, 324 U.S. 793."

union solicitation off company property amounting to a deprivation of the right of self-organization."

The enforcement of the Board's order is denied.

HEALY, Circuit Judge, Dissenting

It is implicit in the majority opinion that had the distributors of union literature been *employees* of respondent, then enforcement as against them of respondent's prohibitory rule would amount to an unfair labor practice. To me, the principle involved is the same whether the distributors were employees furthering the cause of unionization, or whether they were merely union representatives having the same purpose. In either event the distributors would be pursuing the same end, namely, to advise the workers at the plant of their rights under the Act and of the purported advantages of unionization.

I think the Board's order is supported in law and that a decree of enforcement should be entered.

(Endorsed:) Opinion and Dissenting Opinion.

Filed July 27, 1955. Paul P. O'Brien, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14472

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONSANTO CHEMICAL COMPANY, RESPONDENT

DECREE

Before: Stephens, Healy and Pope, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its Order dated May 27, 1954. The Court heard argument of respective counsel on April 25, 1955, and has considered the briefs and the transcript of record filed in this cause. On July 27, 1955, the Court handed down its decision denying enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED, ADJUDGED, AND DECREED that enforcement of the Order of the National Labor Relations Board, dated May 27, 1954, directed against Respondent, Monsanto Chemical Company, Soda Springs, Idaho, its officers, agents, successors, and assigns, be and it hereby is denied.

Endorsed. Decree Filed and Entered August 22, 1955.

(S.) PAUL P. O'BRIEN,
Clerk.

HEALY,
Circuit Judge, Dissenting.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

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No. 488

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

MONSANTO CHEMICAL COMPANY, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE ARGUS PRESS, SEATTLE

No. 492

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

MONSANTO CHEMICAL COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	2
Argument	5
Summary	5
1. The Question of Which Petitioner Seeks Review Was Not Considered by the Court of Appeals	5
2. The Decision of the Court Below Does Not Conflict with the Decision of Any Other Court of Appeals or This Court	8
3. The Decision of the Court of Appeals for the Ninth Circuit Is Correct	9
4. Reversal of the Decisions of the Courts of Appeals for the Fifth and Tenth Circuits in *N.L.R.B. v. Babcock & Wilcox Co.*, No. 250, or *N.L.R.B. v. Seamprufe, Inc.*, No. 251, Would Not Suggest Reversal of the Instant Case	13
Appendix A: Fifth Amendment of United States Constitution and Pertinent Provisions of the National Labor Relations Act, as amended	17
Conclusion	15

TABLE OF CASES

Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793	10
LeTourneau Company v. N.L.R.B., 143 F.2d 67	10
Marsh v. Alabama, 326 U.S. 501	11
N.L.R.B. v. The Babcock & Wilcox Company, 222 F.2d 316	5, 13, 14, 15
N.L.R.B. v. LeTourneau Company, 324 U.S. 793	9, 10, 12, 13
N.L.R.B. v. Monsanto Chemical Company, 225 F.2d 16	7
N.L.R.B. v. Seamprufe, Inc., 22 F.2d) 858	5, 13, 14, 15

Page

N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226..... 12
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474.....6, 10

STATUTES

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq*..... 2
§ 7 (Title 29 U.S.C. § 157)..... 17
§ 8(a) (1) and (2) (Title 29 U.S.C. § 158(a) (1) (2).....1, 17
§10(e) (Title 29 U.S.C. §160(e).....2, 6, 10, 18

CONSTITUTION

United States Constitution, Fifth Amendment.....1, 9, 14, 17

Supreme Court of the United States

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*	
vs.	No. 492
MONSANTO CHEMICAL COMPANY, *Respondent.*	

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court below is reported in 225 F. 2d 16 (R. 199).

JURISDICTION

The jurisdictional requisites are stated in the petition.

QUESTION PRESENTED

Does an employer violate Section 8(a)(1) of the National Labor Relations Act, as amended, by prohibiting nonemployee union organizers from distributing union literature on his plant parking lot during the employees' free time?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the Constitution of the United States and the pertinent provisions of the Na-

tional Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in an Appendix, *infra*, p. 17, *et seq.*

STATEMENT OF THE CASE

The facts as found by the Board were not adopted by the Court of Appeals.

The Board predicated its order, from which Member Beeson vigorously dissented, upon a finding of fact that under the circumstances shown by the evidence it was unreasonably difficult for the union to reach respondent's employees off company property. The Court of Appeals held this finding to be unsupported not only by the "substantial evidence on the record considered as a whole" required by Section 10(e) of the Act (Appendix, p. 18) but said:

> "The record here fails to sustain any such conclusion." (p. 20)

The facts, all admitted, which the petitioner neglected to set out in its "Statement," and which impelled the Court of Appeals to the above-quoted finding are these:

Of respondent's 130 employees (R. 125) 67.6% reside in Soda Springs, one mile from the respondent's chemical plant, and 85% reside within 12 miles of the plant (Resp. Ex. No. 2, R. 191). Mr. W. T. Wright, business agent of the local union (R. 112), testified that he had made no attempt to contact employees in the city of Soda Springs either by mail or in any other manner (R. 121), and that except for trying to distribute literature to the employees at the stop sign on two

occasions, he had never communicated with respondent's employees in any way (R. 122). The union had never endeavored to obtain the names and addresses of the employees from the personnel manager (R. 177), although names alone would have been sufficient, there being no streets in Soda Springs nor mail delivery, mail being sent to the Post Office (R. 175).

Moreover, the respondent's employees are easily identified, since they customarily wear while going about their personal affairs in Soda Springs, jackets supplied by respondent, bearing the name "Monsanto" across the back (R. 181-182).

The record further shows that *union organizers had successfully contacted respondent's employees.* In January, 1953, the union attempted to organize a meeting of respondent's employees in Soda Springs. Three employees attended (R. 106). Union literature was, in fact, distributed to employees at the stop sign near the intersection of the state highway and the company road (R. 72, 75, 77, 95, 96, 117, 119). Mr. A. L. Phelan, grand lodge representative of the International Association of Machinists (R. 58), testified:

> "We have communication with some of the employees practically all the time." (R. 103)

It is admitted by all parties that the respondent has no rule of any kind barring solicitation for union membership in and about its plant (R. 10, 16, 41, 139).

It is further admitted that respondent's rule against distribution of literature on company property is a general rule included in respondent's handbook for employees entitled "Practices and Policies" distributed

to each employee about August 1, 1953 (Resp. Ex. 2, R. 189, 138). The rule reads as follows:

> "Soliciting:
>
> "Soliciting funds and selling tickets or any article on company property without approval of the plant manager is prohibited.
>
> "Petitions:
>
> "Circulating petitions or posting or distributing any literature on company property without approval of the plant manager is prohibited.
>
> "Radios and Cameras:
>
> "Bringing radios and cameras inside the plant without approval of the plant manager is prohibited. * * * " (R. 189)

This rule prohibiting distribution of literature in the parking lot and elsewhere about the plant had been uniformly enforced, not only against the complaining union, but against high school students soliciting support for some school function and against an automobile dealer (R. 149, 16). The completely non-discriminatory character of the rule and its enforcement was noticed by the Trial Examiner (R. 10) and by the Court of Appeals, p. 17.

The respondent expressly gave its permission to the union representatives to distribute literature to the employees on respondent's private road at the intersection of that road with the state highway beside a stop sign (R. 16, 41-42, 66).

The Court of Appeals concluded:

> "It is plain therefore that there was no showing of virtual impossibility or unreasonable difficulty in identifying or reaching the employees or enough

of them so that the self-organization contemplated by §7 of the Act could be initiated." 225 F.2d 16, 21.

ARGUMENT

Summary

The Board's petition for certiorari should be denied for the following reasons:

1. The petitioner seeks review of a question which was not considered by the Court of Appeals.

2. The decision of the court below does not conflict with the decision of any other court of appeals or of this court.

3. The decision of the court below is correct on its facts.

4. Reversal by this court of the decisions of the Courts of Appeals for the Fifth and Tenth Circuits in the cases of *National Labor Relations Board v. The Babcock & Wilcox Company*, No 250, or *National Labor Relations Board v. Seamprufe, Inc.*, No. 251, would not require reversal of the decision of the Court of Appeals for the Ninth Circuit in this case.

1. The Question of Which Petitioner Seeks Review Was Not Considered by the Court of Appeals

The question which the Board has asked this court to review is:

> "Whether an employer violates Section 8(a)(1) of the National Labor Relations Act, as amended, by prohibiting non-employee union organizers from distributing union literature on his plant parking lot during the employees' free time, *where*

> *it is unreasonably difficult for the union to reach the employees off company property in the immediate vicinity of the plant.*" (Pet., p. 2) (Emphasis supplied)

The italicized portion of this question is predicated upon a factual finding of the Trial Examiner affirmed by the Board, reading:

> " . . . that the distribution of union literature to employees off of respondent's property is virtually impossible, at times hazardous, and that it cannot readily be conducted." (R. 26)

The Court of Appeals rejected this finding, as Section 10(e) of the Act (*infra,* Appendix, p. 19) requires it to do unless the finding is "supported by substantial evidence on the record considered as a whole . . . ," *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 490, and said:

> "The record here fails to sustain any such conclusion. * * * It is plain therefore that there was no showing of virtual impossibility or unreasonable difficulty in identifying or reaching employees or enough of them so that the self-organization contemplated by §7 of the Act could be initiated. In addition, Phelan, the Grand Lodge representative, * * * testified 'We have communication with some of the employees practically all the time.'" (pp. 20-21)

Since the Examiner found, and the Board agreed, that respondent had no rule barring solicitation for union membership by employees on company property (R. 10, 36) or by anyone else, for that matter (R. 139), the question raised by the Board in its petition could not arise.

The Court of Appeals said:

> "If this contact existed and yet the union representatives were unable to disclose any authority from any employees to carry on the organization of a union on the employees' behalf, that fact alone is significant. It demonstrates that the record fails to show that the company's refusal to these non-employee union organizers was in some respect a denial of rights granted the employees by §7 of the Act." (p. 21)

Petitioner's statement of the question presented is interesting from yet another standpoint. Petitioner concludes its "question" with this clause:

> " . . . where it is unreasonably difficult for the union to reach the employees off company property *in the immediate vicinity of the plant.*" (Pet., p. 2) (Emphasis supplied)

This is the first time in this litigation that "in the immediate vicinity of the plant" has been mentioned.

The Trial Examiner stated:

> "In sum, the present case involves solely the claimed right of the Union, under the circumstances present herein, to distribute literature to employees during their non-working time, not in the plant or even in the fenced-in plant area, but solely on the adjacent open parking lot maintained by respondent for its employees. The Board and courts have recognized that *employees and a labor organization do not have an absolute right to the use of company property for the distribution of union literature.* But it has likewise been held that where, as here, it is virtually impossible or unreasonably difficult for a labor organization to disseminate literature to employees *off the premises of the employer,* the Act protects the right to carry

on such distribution on company property." (R. 23-24) (Emphasis supplied)

Neither did the Board suggest to the Court of Appeals that the reaching of the employees had to be "in the immediate vicinity of the plant."

This "policy" of the Board, that the reaching of employees must be in the immediate vicinity of the plant, was apparently evolved in the Board's administrative wisdom between the rendition of the opinion of the Court of Appeals and the filing of its petition in this Court to evade the rejection of its findings of fact.

The addition of the words "in the immediate vicinity of the plant" renders the question absurd. The Board apparently takes the position that no matter how readily and conveniently union organizers may contact employees off the employer's premises, an employer commits an unfair labor practice if he fails to provide a place of contact "in the immediate vicinity of the plant." Such a position is utter nonsense to say nothing of being unconstitutional.

The petitioner's statement of the "Question Presented" should, on this record, impel the denial of the petition.

2. The Decision of the Court Below Does Not Conflict with the Decision of Any Other Court of Appeals or of This Court

The petitioner does not argue, for it cannot, that the decision of the Court of Appeals for the Ninth Circuit in the instant case conflicts with any other decisions of any court of appeals or with any decision of this court.

The existence of constant contact by the union with respondent's employees through means other than the distribution of literature in respondent's parking lot and the absence of any prohibition against solicitation for union membership by anyone in any manner except distribution of literature in the plant and parking lot render this case unique.

Petitioner does not undertake to suggest with what decision the decision in the instant case is supposed to conflict.

3. The Decision of the Court of Appeals for the Ninth Circuit Is Correct

Since the Court of Appeals held the Board's finding of "virtual impossibility" and "unreasonable difficulty" to be unsupported by substantial evidence, the court's refusal to enforce the Board's order (R. 35-38) necessarily followed from the most elementary constitutional principles.

The Fifth Amendment to the Constitution of the United States provides in part:

> " . . . nor shall any person * * * be deprived of * * * property without due process of law; nor shall private property be taken for public use without just compensation." (*infra,* Appendix, p. 17)

The Trial Examiner rested his recommendations squarely on *N.L.R.B. v. LeTourneau Company,* 324 U.S. 793 (R. 18), and interpreted the criteria for the application of that case as being

> " . . . the virtual impossibility or unreasonable difficulty of distributing literature off the premises of the employer, . . . " (R. 20)

Thus the Board itself concedes that absent such a finding, there is no basis for its order (R. 35-38).

In declining to enforce the Board's order in the *LeTourneau* case, the Circuit Court of Appeals for the Fifth Circuit, set aside no findings of fact made by the administrative agency, saying,

> "There is no question of fact, . . . " (*LeTourneau Co. v. N.L.R.B.*, 143 F.2d 67)

This court said of the *LeTourneau* and *Republic Aviation Corp.* cases, which were considered together,

> "These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U.S. 793, 798.

In an opinion written by Mr. Justice Reed this court went on to hold that

> " . . . the findings of the Board as to facts, if supported by evidence, are conclusive." p. 799.

This court also stated:

> "The gravamen of the objection of both *Republic* and *LeTourneau* to the Board's orders is * * * that the Board cannot substitute its knowledge of industrial relations for substantive evidence." p. 798.

Commenting upon the effect of the present language of §10(e) of the Act (*infra*, Appendix, p. 19) in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, this court, speaking through Mr. Justice Frankfurter, said:

"But, as the Senate Committee Report relates, 'it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any ambiguity in that statute, however, the committee inserted the words "questions of fact, if supported by substantial evidence *on the record considered as a whole* . . . "'

"This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: 'It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N.L.R.B. v. Nevada Consol. Copper Corp.* (316 U.S. 105) and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation,* and *LeTourneau,* etc., cases, *supra,* without unduly burdening the courts.' The Senate version became the law." pp. 485-486.

Thus no presumption indulged by the Board, nor any policy administratively evolved, will today substitute for the "substantial evidence on the record considered as a whole" which the Court of Appeals for the Ninth Circuit found wanting.

The scope of the *LeTourneau* case was defined by the author of that opinion in his dissent in *Marsh v. Alabama,* 326 U.S. 501, as follows:

"Heretofore this Court has sustained the right of employees, under an appropriate statute, protecting full freedom of employee organization, to solicit union membership in non-working time on the property of an employer and against his express prohibition. This is because the prohibition is an impediment to the right of organization which is protected by a statute which governs a

relation between employers and employees *if and when the latter are admitted to the employers' premises as licensees.* It was recognized in the opinion that the freedom of solicitation was the result of a regulatory statute and was not a Constitutional right. *Republic Aviation Corp. v. Labor Board,* 324 U.S. 793, 803. In the area which is covered by the guarantees of the First Amendment, this Court has been careful to point out that the owner of property may protect himself against the intrusion of strangers." p. 515. (Emphasis supplied)

Again Mr. Justice Reed explained the *LeTourneau* opinion in his dissenting opinion filed in *N.L.R.B. v. Stowe Spinning Co.,* 336 U.S. 226 at page 243, and quoted by the court below at page 21:

> "It has never been held that where the employees do not live on the premises of their employer a union organizer has to be admitted to those premises. The present situation differs from the employer-controlled areas where employees both live and work in that here union organizers may solicit the employees on the streets or in their homes or at public meeting houses within a few miles of their employment. Employees are not isolated beyond the hours of labor from an organizer nor is an organizer denied access to the employees. After an organizer has convinced an employee of the value of union organization, that employee can discuss union relations with his fellow-employees during non-working hours in the mill. This gives opportunity for union membership proliferation. *Republic Aviation Corp. v. Labor Board* and *Labor Board v. LeTourneau Company of Georgia,* 324 U.S. 793."

Justice Reed went on to point out, p. 244, that any

broader interpretation of the *LeTourneau* decision would raise "serious problems under the Fifth Amendment."

The question the Board is really asking this court to decide is that stated *supra*, p. 1:

> "Does an employer violate Section 8(a)(1) of the National Labor Relations Act, as amended, by prohibiting non-employee union organizers from distributing union literature on his plant parking lot during employees' free time?"

An affirmative answer to that question would be a holding that by the National Labor Relations Act Congress had imposed a servitude on parking lots in favor of union organizers. Clearly no such reading of Congressional intent should be indulged in the absence of express language to that effect, because this would raise serious questions under the Fifth Amendment.

It nowhere appears in the Act that Congress intended the Board to seize private property for union organizational purposes or that it intended to authorize labor union organizers to pre-empt without compensation such private property as might contribute to their convenience in organizing campaigns. Any such intent would be in sharp conflict with the Fifth Amendment, *infra*, Appendix, p. 17.

4. Reversal of the Decisions of the Courts of Appeals for the Fifth or Tenth Circuits in *N.L.R.B. v. Babcock & Wilcox Co.*, No. 250, or *N.L.R.B. v. Seamprufe, Inc.*, No. 251, Would Not Suggest Reversal of the Instant Case

The petitioner has endeavored to give the impression that decisions in the *Babcock & Wilcox*, 222 F.2d

316, and *Seamprufe,* 222 F.2d 858, cases would determine the case at bar and to foreclose argument before this court on behalf of the respondent.

That these two decisions are not controlling of the instant case is apparent from the petitioner's own statement about them in its petition in *N.L.R.B. v. Babcock & Wilcox Company,* 222 F.2d 316, No. 250, where the Board says on page 12 of that petition:

> "The court below and the Tenth Circuit in *National Labor Relations Board v. Seamprufe, Inc.,* ..... F.2d ....., 36 LRRM 2095, in which the Board is also filing a petition for certiorari, have rejected the accommodation thus made by the Board between these two competing interests. *The difference between the Board and the two courts does not turn upon a factual disagreement as to the relative facility of communication between employees and union representatives in and around the plant and elsewhere.* Rather, the two courts appear to have adopted the view that, except where employees live and work on company property isolated from outside contacts, the employer's proprietary interest is paramount to the employees' interest in self-organization insofar as access by non-employee organizers is concerned and that the employer may therefore lawfully bar such organizers from his premises." (Emphasis supplied)

The italicized portion of the Board's statement quoted above is precisely the point on which the Court of Appeals for the Ninth Circuit disagreed with the Board.

In candor it should be pointed out that the quoted statement from the Board's petition in the *Babcock &*

Wilcox case is erroneous. In its decision in *N.L.R.B. v. Seamprufe, Inc.*, the Court of Appeals for the Tenth Circuit said:

> "The Board found special circumstances of inaccessibility. But we do not think that conclusion is legally justified by the facts. . . . There was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization." 222 F.2d 858, 861.

However, in neither of these cases did the Court of Appeals find that contact by the union with the employees had already been established by other means, as did the Court of Appeals for the Ninth Circuit in the instant case.

Thus by asking this court to retain its petition on the docket for disposition in accordance with the *Babcock & Wilcox* and *Seamprufe* cases, the Board endeavors to supply the evidence wanting to support its rejected findings of fact in the instant case.

Respondent believes that the Courts of Appeals for the Fifth and Tenth Circuits should be affirmed in *Babcock & Wilcox* and *Seamprufe*, respectively. However, reversal of those cases would not determine the instant case in the light of the facts found by the Court of Appeals for the Ninth Circuit.

CONCLUSION

Because the question the Board is asking this court to review is predicated upon a finding of fact the Court of Appeals found unsupported by substantial evidence on the record considered as a whole, and because the decision is admittedly correct in the absence

of the rejected finding (and, respondent believes, with or without the rejected finding), the petition for certiorari should be denied.

If, however, the court should grant the petition, the case should be set down for argument on the merits.

The factual situation brought before the court by the record in the instant case presents the constitutional questions inhering in the Board's position in their sharpest focus, and, should the court not reject the petition summarily, respondent should be allowed to present its own case by briefs on the merits and through oral argument.

Respectfully submitted,

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November 18, 1955

APPENDIX A

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

Section 7 of the National Labor Relations Act (Title 29 U.S.C. §157):

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(1) and (2) of the National Labor Relations Act (Title 29 U.S.C. §158(a) (1) and (2):

"(a) It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;"

Section 10(e) of the National Labor Relations Act (Title 29 U.S.C. §160(e)):

"(e) The Board shall have power to petition any United States court of appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."